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89-622

No. ——

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

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GLEN A. TRIMPER,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent*

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS**

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OCOBER 1989

40 pp

## QUESTION PRESENTED

Whether due process of law mandates the exclusion of evidence that was previously requested by the defense, but not disclosed by the prosecution until late in the defense portion of the trial.

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GLEN A. TRIMPER,

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UNITED STATES OF AMERICA,

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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The petitioner, Glen A. Trimper, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case on August 23, 1989.

## OPINIONS BELOW

The opinion of the United States Air Force Court of Military Review is reported at 26 M.J. 534 (A.F.C.M.R. 1988) (Appendix A). The opinion of the United States Court of Military Appeals is reported at 28 M.J. 460 (C.M.A. 1989) (Appendix B).

## JURISDICTION

The final order of the United States Court of Military Appeals was entered on August 23, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3)

(Supp III 1985) and 10 U.S.C. § 867(h) (Supp III 1985).

## CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, as follows:

> No person shall be . . . deprived of life, liberty, or property without due process of law . . . .

## STATEMENT OF THE CASE

The petitioner, an Air Force captain (O-3), was tried by a general court-martial in February 1987, at Elmendorf Air Force Base, Alaska. Contrary to his pleas, he was convicted of wrongfully using marijuana and cocaine. The petitioner was sentenced to a dismissal, confinement for 7 years, and total forfeitures. The convening authority approved these results, however, the confinement was reduced to 5 years. The United States Air Force Court of Military Review affirmed the findings of guilty and modified the sentence to a dismissal, confinement for 3 years, and total forfeitures.

The Government's case-in-chief rested upon the testimony of various eye witnesses. Namely, the Government called the petitioner's former wife, a former girlfriend, a neighbor, and others who were familiar with the petitioner. These witnesses testified to seeing the petitioner use marijuana and cocaine on a number of occasions.

On direct examination, the petitioner denied any drug use during the charged period. Moreover, he testified that the Government witnesses had personal motives to commit perjury. On cross-examination, the petitioner was questioned on a variety of subjects. Ultimately, he stated that he "never" used cocaine.

The prosecutor subsequently called for a session out of the presence of the jury. The prosecutor sought permission to question the petitioner about a urinalysis that

was allegedly performed on the petitioner's urine.[1] The Government contended the petitioner had obtained a private urinalysis at a local civilian hospital. The defense objected to the urinalysis evidence.[2] In particular, the defense asserted that the Government failed to disclose this evidence. The defense maintained that their pretrial discovery request encompassed such evidence. Hence, the defense argued that this evidence should be excluded. Without ever addressing the Government's failure to provide this evidence, the judge merely offered the defense a continuance. He based this remedy on the fact that the defense appeared to be "somewhat surprised" by the prosecution's "late notification". At a later point in the trial the defense declined the continuance.

The prosecution cross-examined the petitioner on this private urinalysis. In response, the petitioner denied any connection to it. On rebuttal the prosecution offered extrinsic evidence of this urinalysis. The prosecution also called witnesses for the purpose of linking the petitioner to the urinalysis in question.

The Air Force Court of Military Review characterized this case as one of "first impression". *United States States v. Trimper*, 26 M.J. 534, 537-538 (A.F.C.M.R. 1988). The Court held that the prosecution was not required to disclose rebuttal evidence unless it was exculpatory in nature or material to punishment. *Id.* at 537. The Court found neither existed. *Id.* at 536-537.

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[1] This urinalysis was positive for cocaine and negative for marijuana (THC).

[2] The defense objected on the basis that the specimen was submitted outside the charged time period, that the reliability of the test was unknown, that there was no showing that the petitioner actually provided the specimen, and that the Government failed to disclose this evidence pursuant to a defense request for all laboratory reports.

Accordingly, the Court found "no basis to overturn" the judge's rulings. *Id.* at 538.

The United States Court of Military Appeals affirmed the petitioner's conviction, but not for the reasons expressed by the Air Force Court of Military Review. In contrast, the Court of Military Appeals found the prosecution should have disclosed the laboratory report and the statement of Mrs. Dale.[3] *United States v. Trimper*, 28 M.J. 460, 468-469 (C.M.A. 1989). The Court reasoned this evidence was "material to the preparation of the defense". *Id.* at 468. However, the Court rejected the argument that the "exclusion of the evidence was necessary to remedy the situation." *Id.* Instead, the Court deferred to the discretion of the judge in fashioning a remedy that served the "interests of justice". *Id.* at 468-469. Moreover, the Court found this remedy was adequate because of its belief that the petitioner had "lied". *Id.* at 469.

## REASONS FOR GRANTING THE WRIT

This Court has long held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The rationale for this rule lies in the realization that a prosecutor should not be the "architect of a proceeding". *Id.* at 88. These same concerns are equally applicable to the instant case. Hence, the petitioner's case offers this Court a rare opportunity to further develop this Constitutional safeguard.

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[3] The Government sought to link the petitioner to the urinalysis via the testimony of Mrs. Dale. Mrs. Dale provided a pretrial statement wherein she claimed the petitioner admitted, to her, that he had obtained a private urinalysis. She ultimately testified about these matters.

In *Brady v. Maryland*, 373 U.S. 83 (1963), the petitioner was charged with murder. At trial the petitioner admitted his participation in the crime, but denied that he had done the actual killing. Nevertheless, the petitioner was convicted. After trial it was discovered that the prosecution failed to disclose a requested statement. This statement concerned a companion who admitted to doing the actual killing. This Court found the nondisclosure amounted to a denial of due process. Hence, the case was returned for a rehearing on sentencing. This result was grounded in the principle that "our system . . . suffers when any accused is treated unfairly." *Id.* at 87.

In *United States v. Agurs*, 427 U.S. 97 (1976), the respondent was convicted of second-degree murder. On appeal, the respondent attacked her conviction on the basis that the prosecution had withheld information on the victim's background. The respondent asserted that the suppressed information (victim's violent character) would have supported her argument of self-defense.

In resolving this issue, this Court observed that the *Brady* rule was applicable to three different situations. *Id.* at 103. That is, in cases where the undisclosed evidence indicated the prosecution's case was based upon perjured evidence, in cases where the undisclosed evidence was material and specifically requested, and in cases where the undisclosed evidence was generally requested. *Id.* at 103-107. Hence, this Court recognized the continuing development of the *Brady* rule.

In *Agurs* this Court was called upon to decide when a nondisclosure rises to the level of constitutional error. Accordingly, this Court announced a standard of "materiality". *Id.* at 112. Specifically, a new trial will be ordered in cases where the omitted evidence creates a reasonable doubt that did not otherwise exist. *Id.*

In *United States v. Bagley*, 473 U.S. 667 (1985), the respondent was convicted of various narcotics charges. Prior to trial the defense made a motion for the disclosure of any inducements to the prosecution witnesses in exchange for their testimony. The Government's response did not disclose any such inducements. After trial the respondent filed requests pursuant to the Freedom of Information Act and the Privacy Act. The subsequent responses indicated that some of the Government witnesses were compensated for their information and testimony.

This Court reformulated the "materiality" standard which was enunciated in *Agurs*. The new standard became the one that was announced in *Strickland v. Washington*, 466 U.S. 668 (1984). Namely, "[t]he evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682. This Court noted that the new test would permit reviewing courts to "consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case." *Id.* at 683.

The above-noted cases indicate that the *Brady* rule has been evolving over time. First, this Court has expanded the types of nondisclosures that are now covered by *Brady*. Second, the "materiality" standard has been relaxed. Consequently, more nondisclosure errors are rising to the level of constitutional error.

A narrow reading of the *Brady* progeny would suggest that they are distinguishable from the petitioner's case. The *Brady* cases involved the nondisclosure of exculpatory evidence which was discovered after trial. Whereas, the petitioner's case involves the late disclosure of apparent inculpatory evidence. However, these are merely narrow distinctions.

The petitioner's case rests in the central focus of *Brady*. The *Brady* rule stands for the proposition that it is fundamentally unfair for a prosecutor to be the "architect of a proceeding." *Brady v. Maryland*, 373 U.S. 83, 88 (1963). The nondisclosure or late disclosure of evidence—whether exculpatory or not— inevitably permits a prosecutor to unfairly control the parameters of a trial. Hence, the *Brady* rule seeks to eradicate this unfair result. *Id.* at 87. The focus has never been on the motives for the nondisclosure. *Id.* Curiously, the Court of Military Appeals placed inordinate emphasis on the prosecutor's apparent lack of bad faith. *United States v. Trimper*, 28 M.J. 460, 468-469 (C.M.A. 1989). Thus their approval of the continuance is traceable, in part, to this misapplication of *Brady*.

The petitioner's case provides a vivid illustration of why due process mandates the exclusion of the evidence at issue. The *Brady* remedy is a new trial. *Brady v. Maryland*, 373 U.S. 83, 88 (1963). Obviously, a new trial is the only remedy which completely eliminates the effects of a nondisclosure. However, when the nondisclosure is identified during the trial—during the defense portion of a trial—exclusion must be the logical remedy. Once the defense begins to present evidence, it is logically committed to the expounded theory. Accordingly, the defense cannot reverse directions in midstream. Yet ironically that is the only "cure" a continuance offers.[4] Again, this traces back to the fact that the prosecutor has become the "architect of a proceeding." *Id.* at 88. Hence, a continuance becomes nothing more than a soiled band aid.

The Court of Military Appeals found the late disclosure was prosecutorial error. *United States v. Trimper*, 28

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[4] It may be inferred that the defense's rejection of the continuance was an expression of their dissatisfaction with the adequacy of such a remedy.

M.J. 460, 468 (C.M.A. 1989). In addition, the Court held the evidence was "material to the preparation of the defense." *Id.*[5]

Prior to the appearance of the private urinalysis evidence, the trial was merely a battle of credibility. However, the late disclosure transformed the focus to matters far beyond credibility. Accordingly, no continuance—regardless of length—could accommodate this shift in focus. Thus the late disclosure became the functional equivalent of a material nondisclosure. That is, the late disclosure created the "reasonable probability" that "the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). As such, only the exclusion of this evidence would ensure a result consistent with due process of law. Otherwise, any other remedy would permit the prosecution to be the "architect of the proceeding." *Brady v. Maryland*, 373 U.S. 83, 88 (1963).

The petitioner's case provides an excellent opportunity for Supreme Court comment on the issue of correcting—at trial—constitutional errors that arise from late disclosures. Late disclosures are the functional equivalent of nondisclosures. Yet, no judicial authority exists on how to remedy the former. Hence, this case provides a powerful vehicle for addressing a legal void through a new application of the *Brady* rule.

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[5] This is another example of the inadequacies of a continuance. Namely, if the defense theory required knowledge of this evidence, no continuance could adjust for the absence of such foundational matters.

## CONCLUSION

The petitioner submits that he has suffered a denial of due process of law. Therefore, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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United States Air Force
*Counsel for Petitioner*

OCOBER 1989

# APPENDICES

## APPENDIX A

## U.S. AIR FORCE COURT OF MILITARY REVIEW

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ACM 26211

UNITED STATES

v.

CAPTAIN GLEN A. TRIMPER, 153-56-9975 FV
United States Air Force

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Sentence Adjudged 26 Feb. 1987

Decided 23 March 1988

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Appellate Counsel for the Appellant: Linda MacLean, Anchorage, Alaska, Michael L. Sandul, Odenton, Maryland, Colonel Leo L. Sergi and Major William J. Reichart.

Appellate Counsel for the United States: Colonel Joe R. Lamport, Lieutenant Colonel Robert E. Giovagnoni, Lieutenant Colonel Morris A. Tanner, Jr. and Major Carole W. Hanson.

Before HODGSON, FORAY and HOLTE, Appellate Military Judges.

DECISION

HODGSON, Chief Judge:

The paramount issue before us is one of first impression: Is the prosecution required to disclose to the defense under R.C.M. 701 the nature and extent of its

rebuttal evidence? Appellate defense counsel argue that R.C.M. 701 should be broadly interpreted to include all evidence within the government's possession so as to preclude "trial by ambush." With surprising candor, they argue that such a disclosure requirement would permit ". . . an accused to be more circumspect in [his] testimony, limit it to the matters at hand and not make broad statements which may be subject to collateral attack." On the other hand, appellate government counsel maintain that the prosecution is not required ". . . to assist the accused in structuring his testimony so that it may not be contradicted."

The appellant was charged with wrongfully using cocaine and marijuana on divers occasions between 1 May 1985 and 1 August 1986. The evidence of the alleged drug use came from witnesses who included his former wife and several close friends who themselves were drug users and who, for the most part, testified under some form of immunity. These individuals all stated they saw the appellant use cocaine and marijuana at various times and places during the period alleged.

The appellant attempted to undercut this testimony by establishing on cross-examination that each had a motive to lie because of a past relationship with him. For example, the appellant suggested that since his former wife came from a family with strong religious beliefs, she falsely testified about him using drugs to justify her divorce. Additionally, the appellant contends that Gary Nelson, a neighbor and former close friend, also lied when he stated he saw him use drugs. The defense maintained that Nelson's testimony was in retaliation for the appellant having told the authorities about the former's pension fraud activities. The defense also urged that Nelson's subsequent marriage to the appellant's former wife implied an unsavory relationship between the two prior to her divorce and gave each a reason to falsely claim the appellant used drugs.

Senior Airman Natividad Hunt became romantically involved with the appellant in April 1986, after his wife left him. The two lived together for about six weeks. Hunt stated that during this time, she saw the appellant use cocaine approximately 20 times in addition to marijuana on numerous occasions. On one occasion after the appellant had snorted cocaine she had her head on his chest and could hear his heart pounding erratically.[1]

The appellant suggested that Hunt's account of his alleged drug use was in revenge for him asking her to move out. He described their relationship as ". . . friends to lovers to I couldn't stand to be around her, she's just a space cadet." Hunt admitted she had told a former boyfriend she was pregnant when she was not, so he would not leave her.

Linda Dale is a civilian employee assigned to the base legal office and has daily contact with the appellant who is also assigned there. Both Mrs. Dale and her husband, Staff Sergeant Michael Dale, were close friends of the appellant and were familiar with the odor and appearance of marijuana. Both testified that they had seen the appellant use marijuana at parties and social gatherings. Additionally, Mrs. Dale indicated that the appellant had admitted to her his use of cocaine. The appellant intimated that Mrs. Dale was biased toward him because he had rejected her overtures for a sexual liaison.

On direct examination the appellant categorically denied any drug involvement during the period alleged. On cross-examination the prosecution questioned him about the time related by Senior Airman Hunt where his heartbeat increased rapidly following his cocaine use. The appellant testified the incident never occurred and that Hunt was lying. When asked specifically if he had

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[1] Tachycardia, or accelerated heart rate, is a symptom of cocaine use.

used ". . . cocaine at any time the night [of the incident]?", the appellant replied, *"I have never used cocaine."* (Emphasis added.) The government argues, both at trial and on appeal, that this sweeping denial of cocaine use by the appellant entitles it to introduce extrinsic evidence in rebuttal to contradict that claim. We agree. *United States v. Garcia-Garcia*, 25 M.J. 652 (A.F.C.M.R.1987); *pet. denied*, 26 M.J. 85 (C.M.A. 1988); *cf. United States v. Strong*, 17 M.J. 263 (C.M.A. 1984).

The evidence the prosecution sought to present was an admission by the appellant to Mrs. Dale that he had been "partying" heavily and had obtained a private urinalysis which established he had cocaine in his system. Additionally, the prosecution offered evidence that on 4 September 1986, the Humana Hospital Alaska laboratory performed a drug screen test on the urine of "Glen Trimper, male, age 30" which was positive for cocaine. The doctor who took the urine testified that it was provided by an individual wearing an Air Force officer's uniform who was approximately six feet one inch tall, average build, with "sandish, dark blond" hair, who stated he was a lawyer. The physical description and occupation of the individual seeking the drug test fits the appellant.

The defense moved to suppress this rebuttal evidence and to preclude cross-examination of the appellant in this area because the prosecution had not complied with R.C.M. 701 by disclosing the existence of such evidence. The government contends that the disclosure of the laboratory test was not required as it was not ". . . intended for use by the trial counsel as evidence *in the prosecution case-in-chief at trial.*" (Emphasis added.) Conversely, the appellant argues that the test was subject to disclosure as it was ". . . *material to the preparation of the defense* . . ." (Emphasis added.) *See* R.C.M. 701(a)(2)(B). Further, that the laboratory report was

discovered just prior to trial was unimportant as the prosecution has a "continuing duty to disclose" additional evidence it has uncovered which is subject to discovery. *See* R.C.M. 701(d). After the trial judge declined to suppress the rebuttal evidence or to preclude cross-examination in this area, the appellant denied submitting a urine sample to the hospital laboratory for drug testing.

Military law provides a direct means of discovery that is broader than that normally available to an accused in a civilian criminal prosecution. *United States v. Eshalomi*, 23 M.J. 12 (C.M.A.1986). R.C.M. 701 is a melding of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), which holds that due process requires the prosecution to disclose to the defense any *exculpatory* evidence it has in its possession, with Article 46 of the Code which requires the defense to have an equal opportunity to obtain witnesses and evidence. Its stated purpose is to provide for a legitimate need for nondisclosure and to eliminate "gamesmanship" from the discovery process. *See* analysis to R.C.M. 701, M.C.M. 1984, App. 21, A21-29. The rule generally parallels the disclosure practice followed by the federal district courts. *See* Fed. R. Crim. P. 16. For this reason the federal decisions in this area may be profitably examined for guidance.

*Brady v. Maryland, supra*, did not create a federal right of pretrial discovery, *United States v. Ball*, 547 F. Supp. 929 (E.D. Tenn. 1981), and the discovery practice is governed by the criminal procedure rule involved, i.e., R.C.M. 701. *Cf. United States v. Clevenger*, 458 F. Supp. 354 (E.D. Tenn. 1978). We interpret R.C.M. 701(a)(2)(A) & (B) as requiring the trial counsel to disclose to the defense: 1) any *exculpatory* evidence it possesses as mandated by *Brady v. Maryland, supra;* and 2) the evidence it intends to offer in its *case-in-chief*. This latter requirement does not require the prosecution to disclose the manutiae of its evidence, its trial strategy

or legal theories. *United States v. Elam*, 678 F.2d 1234 (5th Cir. 1982); *United States v. Peifer*, 474 F. Supp. 498 (E.D. Penn. 1979). There is no constitutional right to the discovery of evidence that is not exculpatory. *Griffin v. Commonwealth*, 606 F. Supp. 941 (E.D. Va. 1985); *aff'd*, 780 F.2d 1018 (4th Cir. 1985); *cert. denied*, 476 U.S. 1120, 106 S.Ct. 1982, 90 L.Ed.2d 665 (1986); *see also United States v. Krauth*, 769 F.2d 473 (8th Cir. 1985).

The defense does not claim that the prosecution deliberately suppressed material evidence that was favorable to the appellant, *see United States v. Kern*, 22 M.J. 49 (C.M.A. 1986), and indeed it had not. Far from being helpful, the evidence established that the appellant was untruthful when he testified he had never used cocaine. Appellate defense counsel's main thrust is that the disclosure of the laboratory test and the testimony concerning it was required by R.C.M. 701(a)(2)(B), and had the appellant known the prosecution had obtained the test results, he would have testified differently on cross-examination.

In *United States v. Callara*, 21 M.J. 259, 262 (C.M.A. 1986), Chief Judge Everett, in discussing rebuttal evidence under Mil. R. Evid. 304, suggested that the sound administration of criminal justice favors disclosure of rebuttal evidence. However, Chief Judge Everett went on to say that, "Obviously, the disclosure rules were never designed to give comfort to an unscrupulous witness who plans to falsify his testimony." *Supra*, at 263. The federal courts have generally concluded that Fed. R. Crim. P. 16 requires the prosecution to disclose to the defense only the non-exculpatory evidence it intends to offer in its case-in-chief. *United States v. Kilroy*, 523 F. Supp. 206 (E.D. Wisc. 1981); *United States v. Bremer*, 482 F. Supp. 821 (W.D. Okl. 1979). While the appellant denied he was the individual who requested the drug test, it can be inferred from the transcript that he was not

surprised at the existence of the test results, but only that the prosecution was also aware of it.

We hold that rebuttal evidence is not discoverable under R.C.M. 701 unless it is exculpatory in nature or material to punishment. The challenged evidence was not exculpatory and was not offered in the case-in-chief. Rebuttal evidence is that "given to explain, repel, counteract, or disprove facts given in evidence by the adverse party." *United States v. Callara, supra*, at 264. By definition it is offered after the opposing party has rested its case. Had the President in his rule making capacity under Article 36 of the Code wished to make rebuttal evidence discoverable under R.C.M. 701, he could have done so. That it was omitted lends support to the conclusion that it is not subject to disclosure under R.C.M. 701. *See generally United States v. Ryland*, 806 F.2d 941 (9th Cir. 1986).

The appellant also argues, citing *United States v. Callara, supra*, and *United States v. Reynolds*, 15 M.J. 1021 (A.F.C.M.R. 1983), that the statement by him to Mrs. Dale that he had obtained a private urinalysis that had come back positive for cocaine should have been suppressed because the prosecution failed to disclose its contents to the defense as required by Mil. R. Evid. 304 (d) (1.). Again we appear to be sailing in unchartered waters. The challenged statement was not obtained by a criminal investigator or anyone connected with government as were the situations in the *Callara* and *Reynolds* decisions. Here, the statement was the result of a conversation motivated by friendship where the appellant could not possibly have thought that it was official in nature. *See United States v. Duga*, 10 M.J. 206 (C.M.A. 1981). While the rule itself makes no distinction between statements taken by law enforcement agents and those in an official capacity and statements that were the result of a causal conversation, the analysis of Mil. R. Evid. 304 suggests they should be treated differently. Rule 304

deals with the admissibility of "an involuntary statement" obtained through the actions of officials or agents of the United States in a governmental capacity. *See* analysis to Mil. R. Evid. 304, App. 22, A22-9. Since the proffered statement was not given to a government agent during an interrogation, the prosecution was not obligated to disclose its contents to the defense under Mil. R. Evid. 304, and further, since it was not exculpatory in nature and not offered in the government's case-in-chief, disclosure was not required under R.C.M. 701. *United States v. Jackson*, 757 F.2d 1486 (4th Cir. 1985); *United States v. Pollack*, 534 F.2d 964 (D.C. 1976).

Discovery matters are within the sound discretion of the trial judge and are reversible only upon an abuse of that discretion. *United States v. Crow Dog*, 532 F.2d 1182 (8th Cir. 1976). The discovery issues that confronted the trial judge are novel, and, as we have stated earlier, involve questions of first impression. We find no basis to overturn his rulings.

The remaining assigned errors are resolved against the appellant. Our review of the trial transcript convinces us that only so much of the approved sentence as provides for a dismissal, confinement for three years and total forfeitures of all pay and allowances is appropriate. The findings of guilty and the sentence, as modified, are

AFFIRMED.

Senior Judge FORAY and Judge HOLTE concur.

## APPENDIX B

## U.S. COURT OF MILITARY APPEALS

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No. 60,399
ACM 26211

UNITED STATES,
*Appellee,*

v.

GLEN A. TRIMPER, Captain U.S. Air Force,
*Appellant.*

---

Aug. 23, 1989

---

For Appellant: *Michael L. Sandul, Esquire* (argued); *Colonel Richard F. O'Hair, Colonel Leo L. Sergi, Major William J. Reichart, Captain Paul M. Dankovich.*

For Appellee: *Major Terry M. Petrie* (argued); *Colonel Joe R. Lamport* and *Lieutenant Colonel Robert E. Giovagnoni.*

*Opinion of the Court*

EVERETT, Chief Judge:

At his general court-martial in February 1987, Captain Trimper, an Air Force judge advocate, contested specifications alleging wrongful use of cocaine and marijuana on divers occasions between May 1, 1985, and August 1, 1986, in violation of Article 112a, Uniform Code of Military Justice, 10 USC § 912a. Nonetheless, the members found him guilty and sentenced him to dismissal, confinement for 7 years, and total forfeitures.

The convening authority approved these results, except for reducing the confinement to 5 years. On review below, the Court of Military Review affirmed the findings and most of the sentence—cutting the confinement even further, to 3 years. 26 MJ 534 (1988).

Through various issues, appellant complains in this Court about use of evidence of a private urinalysis allegedly commissioned by himself and of admissions concerning the urinalysis report that allegedly were made by him to an office co-worker. 27 MJ 463. Specifically, he complains that trial counsel did not disclose this evidence to the defense until just before the prosecutor used it during the trial; and he urges that, as a result, the evidence should have been suppressed. Instead, the challenged evidence not only served as a basis for trial counsel's cross-examination of appellant but also was admitted directly against him.

In our view, Trimper, by his own testimony, opened the way for the prosecution to use the contested evidence, even though it otherwise would have been inadmissible. Although we agree that trial counsel should have disclosed this evidence to the defense, *see* RCM 701(a)(2)(B) and Mil. R. Evid. 304(d)(1), Manual for Courts-Martial, United States, 1984, we conclude that the military judge acted within his discretion in fashioning an appropriate remedy for this prosecutorial delict, *see* RCM 701(g)(3) and Mil. R. Evid. 304(d)(2)(B).

I

As noted earlier, the time period in which Trimper allegedly used marijuana and cocaine was from May 1, 1985, to August 1, 1986. His wife and several of his close friends, many of whom themselves had been drug users and were testifying under grants of immunity, revealed various occasions when they had observed such use within that time frame.

During extensive direct and cross-examination, appellant asserted that all of the witnesses against him had lied and that all had compelling motives for their perjury. The steadfastness of his position in this regard can best be seen from the following limited colloquy with assistant trial counsel during cross-examination:

> Q. I'd like to move on to talk about each of these witnesses' testimony, the testimony of the witnesses against you. Now, your ex-wife Kim has said that you used drugs over a period of time, and that you used cocaine on one occasion within the charged time frame. I take it you are denying those allegations?
>
> A. Of course I'm denying them. They're not true. I have to deny them.
>
> Q. And, essentially, you believe she's being untrue?
>
> A. I know she's being untrue.
>
> Q. How about Gary Nelson. He's made some allegations, not precisely the same time frame, but generally so?
>
> A. He's a bold faced liar and a cheat and a thief.
>
> Q. And Linda Dale, how about the allegations at Wasilla?
>
> A. Lies.
>
> Q. And Mike Dale?
>
> A. Lies.

Subsequent to this exchange, appellant was questioned about incidents involving an unusually fast heartbeat rate. First, he was asked about an occasion when his girlfriend had mentioned to him, one night while lying in bed together, that his heart was pounding at a fast rate—an incident that appellant denied had ever happened. Then he was questioned about an occasion on which he reported to the emergency room because he feared he was having a heart attack; indeed, on that

occasion his heart rate at the hospital was recorded in his medical file as 100 beats per minute. The relevance of this questioning became apparent in this colloquy:

> Q. Are you aware that tachycardia or accelerated heart rate is a symptom of cocaine use?
>
> A. I have heard that.
>
> Q. Did you use cocaine *at anytime the night before* [the feared heart attack]?
>
> A. *I have never used cocaine.*

(Emphasis added.)

Appellant repeated his expansive denial of drug involvement a short time later when he was discussing with assistant trial counsel his investigative interviews with OSI agents:

> Q. Now, the time that you talked to them [OSI] initially, you were not aware that Linda Dale and Mike Dale were going to come forward with any testimony against you?
>
> A. No, I was in, I had no idea who was going to lie about me.
>
> Q. So, you denied some of the things that the other three people had said?
>
> A. I denied everything anybody had ever said about any wrongdoing from the git-go, because *it's not true about any drug involvement.*
>
> Q. What I'm getting at is, were you being cagey with them by not addressing these other instances?
>
> A. What do you mean?
>
> Q. If they asked you about these three individuals, were you denying and not giving them information about possible use on these other occasions?

A. There is no use, there is no use, there's no use, there's no use to talk about. How could I be cagey about something that's not there?

* * * *

Q. Mr. Lazar [civilian defense counsel] asked you the question if between 1 May '85 and 1 August '86, you had used drugs, and your answer was, I believe . . .

A. Of course, it was no.

Q. You understand that *there's been some testimony about a couple of later dates? Are you being cagey with us?* We're talking specifically about Mike Dale and the other incidents up in Wasilla?

A. *Oh, you're talking about the ones that are outside the spec that was still brought in. They're false too, I'm not being cagey. I have not used drugs.* These five people who have come in here today, not today, the last few days, have lied, period.

Q. *So, you just deny outright that you have used drugs?*

A. *Yes, yes.*

(Emphasis added.)

Defense counsel objected to the last query, insisting that the prosecutor should have to restrain his questioning to events within the time frame charged. Civilian defense counsel acknowledged that the judge had ruled that the alleged incident at Wasilla, later in August, "falls within the parameters of the specification, those allegations." Defense counsel clarified his objection that the questioning seemed to go beyond that, as well.

After some further difficulty in this regard, defense counsel suggested, "Perhaps if we just keep the questions within the parameters of the specifications as has been alluded to [by] the military judge, and obviously,

Captain Trimper understands what that means, it will be resolved." The military judge agreed and sustained the defense objection to broader questioning.

At an Article 39(a), UCMJ, 10 USC § 839(a), session called at the prosecution's request shortly thereafter, assistant trial counsel revealed that, in light of appellant's denial of drug use or, specifically, cocaine use at any time, the Government wanted to cross-examine appellant about a urinalysis performed on a specimen provided by Trimper at a local civilian hospital on September 4, 1986. Trial counsel produced the laboratory report of the analysis on that specimen.

Defense counsel objected. He pointed out that the specimen had been submitted outside the time frame charged; that the reliability of the laboratory analysis was unknown; and that there was no showing that the person who gave the specimen, identified as "Glen Trimper," in fact was appellant. As to the latter point, the prosecutor responded that appellant had made a statement to an office co-worker—Mrs. Dale, who already had testified against appellant in another respect—about submitting a specimen for the urinalysis. The prosecutor further argued that the fact that an Air Force officer would go to a local civilian hospital and voluntarily submit a sample for testing was probative—apparently, of his guilty state of mind.

Here, the military judge asked whether appellant's alleged statement to Mrs. Dale was on the list of statements given to the defense, and assistant trial counsel responded in the negative. Trial counsel explained that the Government had overlooked providing this statement because the prosecution had focused primarily on the laboratory report, not on the statement that had led them to it. In light of its oversight, the prosecution volunteered at that time not to cross-examine appellant about the statement.

The defense continued to press its objection to the laboratory report. Besides renewing its argument that the report was not an analysis of a specimen submitted by Trimper, the defense pointed out that the Government had been under an obligation—which it had failed to meet—to reveal the report pursuant to an outstanding discovery request for all laboratory reports regarding appellant. The prosecution resisted the notion that the defense request included this particular report; and it argued further that, even so, the remedy under RCM 701(a)(2) was a continuance to permit the defense to prepare, not exclusion of the evidence.

To delve into the defense contention that the report was not of appellant's specimen, the military judge called Mrs. Dale to testify. She stated that in September 1986 appellant had told her that he had taken a urinalysis "downtown" and that its results were "positive for cocaine and negative for marijuana."

Ultimately, the military judge overruled the defense objections to the laboratory report, to Mrs. Dale's testimony about appellant's statement to her in that connection, and to the Government's cross-examination of Trimper concerning these matters. He indicated that the report could be used to show appellant's cocaine use sometime shortly before September 4. Furthermore, he concluded that appellant's "submission to a private urinalysis test" was "somewhat inconsistent with his denial of" drug use—apparently permitting the Government to use the evidence in rebuttal.[1] As a basis for his rulings, the military judge made extensive findings of fact and performed, as well, the test for unfair prejudice mandated by Mil. R. Evid. 403.

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[1] Moreover, according to the military judge the evidence also was "relevant in that it . . . reflects upon the accused's self-professed attempt to gain expertise as to the urinalysis program and how it worked and his belie[f] in the validity of the Air Force urinalysis system."

In addition—referring expressly to Mil. R. Evid. 304 (d) (2) (B) and impliedly to RCM 701(g) (3)—the military judge determined that exclusion of the challenged evidence was not necessary to remedy the late disclosure of the evidence to the defense. Specifically, he ruled:

> (4) While I realize that the defense may have been somewhat surprised by the prosecution's attempt to use the 4 September urinalysis result and the additional statements by Mrs. Dale in this case, under all the circumstances of this case, including both the Government's and the defense's difficulty in securing full access to witnesses due to the witnesses' concerns about criminal liability, possible defamation suits, and other adverse personal impact, I conclude that the Government's later notification of Mrs. Dale's statement about the urinalysis should not cause exclusion of that evidence. I'm willing to grant a reasonable continuance to the defense so that they may pursue this matter to their satisfaction, but exclusion of such evidence is not a reasonable remedy under the circumstances, in my judgment.

Initially, the defense made a request for such a continuance but later withdrew it.

At this point, appellant's cross-examination continued with the following extensive colloquy:

> Q. Earlier in your testimony you made two statements. First of all, stating I have not used drugs, and later I have never, or excuse me, earlier, I have never used cocaine. Do you recall those statements?
>
> A. Yes.
>
> ATC: I'd like to hand you Prosecution Exhibit #3 for identification [a laboratory urinalysis report] and ask you to take a few moments to look at that three-page document. (The witness reviewed Prosecution Exhibit #3 for identification).

Q. Do you feel you're fully familiar with that?

A. Yes.

Q. Captain Trimper, have you ever been to the Humana Hospital?

A. No.

Q. In Anchorage?

A. No.

Q. Have you ever met a Doctor Donald Rogers?

A. Is he military?

Q. It would appear that Doctor Rogers is associated with Humana Hospital?

A. No. Let me . . . never anybody saying I'm Doctor Rogers or something like that. I guess I could have run into him or something like that.

Q. Captain Trimper, did you on the 4th of September of 1986, submit a urine specimen for cocaine and marijuana analysis?

A. No.

Q. I'm handing the witness a specimen bottle with what appears to be urine in it and a green lid on it. Could you tell us what the name is that appears on that specimen bottle?

A. The name says Trimper—Glen.

Q. Is Glen spelled with one "N" or two?

A. One "N."

* * * * *

Q. Did you ever go to the Humana Hospital?

A. No, I've never been to Humana Hospital.

Q. Are you aware that this test report indicates that a Glen Trimper went to Humana Hospital on

the 4th of September 1986, and submitted a urine sample which was tested positive for cocaine?

A. I glossed over that second page, may I see it again?

Q. Certainly.

A. Cocaine/Pos, Cannibis/Neg, Alcohol/Neg. This person, Glen Trimper, is a doper.

Q. And the final page is the statement of an individual, of a Doctor Rogers, is that correct?

A. Is that what that says?

Q. That's what it appears to be.

A. It's his signature on there. I don't see my signature on there.

* * * * *

Q. You're saying that you're not the same Glen Trimper who submitted the sample?

A. Clearly not.

ATC (CAPT BOOMGARDEN) : One moment, please, sir.

Q. Have you at any time, Captain Trimper, made a statement to Linda Dale that you were going to the Humana Hospital to have a urine sample taken?

A. No.

Q. Did you at any time in September of 1986, say to Linda Dale that you had received the results back from a urine specimen that you had submitted downtown in Anchorage, and that that sample came back positive for cocaine?

A. Obviously not, no.

> Q. So, is it your testimony then that you never submitted a urine sample at the Humana Hospital, and this is an apparent mistake of identity?
>
> A. Well, all I can say, I never submitted a sample. Mistake of identity means like when people mistake faces and things like that. That is either someone else by the name of Glen Trimper or someone who went there and used my name.

Both the laboratory report and Mrs. Dale's testimony about appellant's statement to her relating to that report ultimately found their way into evidence. Additionally, Dr. Rogers, a pathologist at Humana Hospital in Anchorage, Alaska, testified that he could remember only one Air Force officer ever coming to the hospital for a urinalysis; that person was about 6'1" to 6'2" tall, average build, sandy hair, and identified himself as a lawyer named Glen Trimper. Appellant is 6'3" tall, weighs 200 pounds, and has light brown hair. However, Dr. Rogers was unable to say whether the specimen to which the laboratory report related was the one submitted by that officer or whether appellant was that officer.

II

Both at trial and on appeal the defense has challenged the reception in evidence of the laboratory report of the urinalysis performed at Humana Hospital; Dr. Rogers' testimony relating to the identity of the specimen's contributor; Mrs. Dale's testimony concerning appellant's statements to her about the urinalysis and its results; and, of course, the cross-examination of appellant about the laboratory report and the statements to Mrs. Dale. Appellant insists that reception of this evidence was forbidden by Mil. R. Evid. 404(b) and 608(b) and also that its exclusion was necessary as a sanction for failure of the prosecution to perform its disclosure obligations.

A

According to Mil. R. Evid. 608(b), a witness "may, . . . in the discretion of the military judge," be cross-examined about specific instances of conduct.[2] However, apart from a "conviction of crime as provided in Rule 609," extrinsic evidence may not be received to attack or support the credibility of a witness, *see* Mil. R. Evid. 608(b)—unless that evidence is offered to show "[b]ias, prejudice, or any motive to misrepresent." *See* Mil. R. Evid. 608(c). Presumably this limitation on extrinsic evidence reflects an intent to avoid confusion, distraction, and delay in trials.

Mil. R. Evid. 404(b) prohibits evidence of other misconduct "to prove the character of a person in order to show that the person acted in conformity therewith." This prohibition—which we have often applied, *see, e.g., United States v. Hicks*, 24 M.J. 3, 7 (CMA), *cert. denied*, —— U.S. ——, 108 S.Ct. 95, 98 L.Ed.2d 55 (1987); *United States v. Owens*, 21 MJ 117, 122 (CMA 1985)—is intended to prevent a factfinder from inferring that an accused must be guilty because he is a "bad person" and has a propensity or disposition to commit crimes like those for which he is being tried.

Under Mil. R. Evid. 608(b) and 404(b), it would appear initially that the cross-examination of Trimper about his private urinalysis might be permitted "in the discretion of the military judge," even though it concerned uncharged misconduct on his part, but that introduction of extrinsic evidence to contradict his denials was improper. However, more thorough analysis leads to a different conclusion.

The starting point for his analysis is *Walder v. United States*, 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503 (1954),

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[2] In exercising his discretion, the military judge should consider the factors mentioned in Mil. R. Evid. 403, Manual for Courts-Martial, United States, 1984.

where the Supreme Court held that, when a defendant testified on direct examination that he had never had any narcotics in his possession, the Government was free to introduce evidence of prior possession of narcotics, even though this evidence would otherwise have been inadmissible because it was obtained by an unreasonable search and seizure. As the Court pointed out:

> It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths.

347 U.S. at 65, 74 S.Ct. at 356, 98 L.Ed. at 507.

In *Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971), the Supreme Court used the same rationale in holding that, although an unwarned statement obtained in violation of the rules prescribed by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1964), could not be received as part of the prosecution's case-in-chief, it could be introduced in rebuttal to impeach the defendant's testimony on direct examination.[3] Then in *United States v. Havens*, 446 U.S. 620, 100 S.Ct. 1912, 64 L.Ed.2d 559 (1980), the Supreme Court slightly extended the principle of *Walder* in ruling that evidence that had been illegally seized and otherwise was inadmissible because of the exclusionary rule could be used to impeach "a defendant's statements made in response to" government "cross-examination reasonably suggested by" his direct testimony. *Id.* at 627, 100 S.Ct. at 1917, 64 L.Ed.2d at 567.

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[3] On the other hand, an involuntary statement may not be used even for impeachment. *Mincey v. Arizona*, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978).

The lesson we draw from this line of cases is that even an exclusionary rule which has a constitutional basis cannot be manipulated by a defendant to permit him to commit perjury with impunity. If this be so, it seems clear that Mil. R. Evid. 608(b) and 404(b) must be applied in the same way. Thus, if a witness makes a broad collateral assertion on direct examination that he has never engaged in a certain type of misconduct or if he volunteers such broad information in responding to appropriately narrow cross-examination, he may be impeached by extrinsic evidence of the misconduct. *Cf. United States v. Clemente*, 640 F.2d 1069 (2d Cir.), *cert. denied*, 454 U.S. 820, 102 S.Ct. 102, 70 L.Ed.2d 91 (1981); *United States v. Opager*, 589 F.2d 799 (5th Cir. 1979); *United States v. Benedetto*, 571 F.2d 1246 (2d Cir. 1978); *United States v. Bell*, 506 F.2d 207 (DC Cir. 1974); *United States v. Beno*, 324 F.2d 582 (2d Cir. 1963), *cert. denied*, 379 U.S. 880, 85 S.Ct. 147, 13 L.Ed. 2d 86 (1964); *United States v. Banker*, 15 MJ 207, 211-12 (CMA 1983); *United States v. Garcia-Garcia*, 25 MJ 652 (AFCMR 1987), *pet. denied*, 26 MJ 85 (1988); *United States v. Bowling*, 16 MJ 848 (NMCMR 1983).[4]

Under Mil. R. Evid. 404(a)(1), an accused's character generally is not in issue at trial. However, he can offer "[e]vidence of a pertinent trait of" character to prove that he "acted in conformity therewith on a particular occasion;"[5] and in that event, the prosecution may "rebut" this evidence. As we interpret Mil. R. Evid. 404(a)(1), an accused who testifies that he has never en-

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[4] Even when an accused has opend the door with his answer, the judge, after determining that the assertion was volunteered, must still decide whether the probative value of the proffered extrinsic evidence "outweigh[s] . . . the danger of unfair prejudice," *see* Mil. R. Evid. 403.

[5] We have construed "pertinent trait" broadly. *See, e.g., United States v. Court*, 24 MJ 11 (CMA 1987); *United States v. Weeks*, 20 MJ 22 (CMA 1985).

gaged in conduct like that for which he is being tried is offering evidence that he possesses the "pertinent trait of" abstraining from such conduct. A logical—and permissible—rebuttal by the prosecution is to show that the accused previously has engaged in similar misconduct.

Trimper was asked on cross-examination whether he had "use[d] cocaine at any time the night before"—a quite specific question. He responded, "I have never used cocaine"; and, in so doing, he went far beyond the scope of the question. To show Trimper's lack of credibility, trial counsel was entitled to cross-examine him about his obtaining a private urinalysis and about the outcome of this test. Thereafter, in light of his denials, the prosecution was entitled to offer extrinsic evidence to show that his testimony on this matter was false—from which the courtmembers could reasonably infer that some of his other testimony also was false.

Since Trimper's answer that he had never used drugs was "[e]vidence of a pertinent trait of" character—that he was a nonuser of drugs—the Government was entitled to "rebut" this evidence. *See* Mil. R. Evid. 404 (a)(1). The extrinsic evidence that Trimper had himself obtained a drug test which proved to be positive clearly rebutted his claim that one of his traits was that he never used drugs; and so it was admissible for this purpose, as well as to impeach his credibility.[6]

The case would be quite different if the testimony about no prior use of drugs had been "extracted from" Trimper by the prosecution or if the prosecution had been seeking to "turn a defense witness into a character witness through cross-examination and, thereby, bootstrap otherwise inadmissible evidence into the case." *Cf. United*

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[6] Trimper's obtaining the private urinalysis might also be construed to demonstrate his consciousness of guilt and, therefore, to constitute an admission by conduct. Such an admission would be substantive evidence.

*States v. Maxwell*, 21 MJ 229, 230 (CMA 1986). However, as we read the record, Trimper's denial that he had ever used drugs was gratuitous; and undoubtedly it was volunteered in the belief that it would help persuade the courtmembers that he was an innocent man being victimized by a band of liars.

Even though the extrinsic evidence was admissible to impeach Trimper's credibility and to rebut his character evidence, it could not properly be used by the factfinder to infer that, because appellant had used drugs on a later occasion, he was guilty of the charged offenses. Upon request, the defense would have been entitled to a limiting instruction to this effect. However, there was no request that the members be instructed as to the limited purposes for which the challenged evidence was admitted; and, absent such a request, the military judge was not required to advise the members in this regard. Mil. R. Evid. 105.

C

Appellant contends that the Government had a duty to disclose to the defense before trial that it possessed the report of the urinalysis test results and evidence of Trimper's remarks to Mrs. Dale about the positive urinalysis. As to the report, Trimper relies on RCM 701 (a) (2) (B), which requires the Government, "[a]fter service of charges [and] upon" defenes request, to "permit the defense to inspect . . . [a]ny results or reports of physical or mental examinations, and of scientific tests or experiments . . . which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial."

According to the defense view, trial counsel intentionally did not disclose this evidence in its possession, so that the prosecution might lie in wait during the trial and affirmatively and skillfully steer Trimper into his sweeping denials—all in order that it might devastatingly use the concealed information for impeachment and re-

buttal purposes. Such trial-by-ambush tactics are discouraged; and where clearly they have been employed, we will recognize them for what they are. *See United States v. Maxwell, supra* at 230. However, the military judge expressly found an absence of prosecutorial "bad faith"; and the record adequately supports those findings.

Even so, we conclude that the laboratory report should have been disclosed. It concerned a private urinalysis performed on September 4 to detect cocaine and marijuana; and Trimper was being tried for use of both substances over a period of time extending into August. In view of this very short interval of time, we conclude that the positive result of the urinalysis was "material to the preparation of the defense." Even though trial counsel did not intend to use the report in his case-in-chief, he should have recognized its materiality to the defense and disclosed it.

Insofar as the statements to Mrs. Dale are concerned, we have observed that the "unambiguous language [of Mil. R. Evid. 304(d)(1)] includes remarks made during informal conversations." *United States v. Callara*, 21 MJ 259, 262 (CMA 1986). Moreover, "[t]his unambiguous language" is not limited to statements made by an accused to law-enforcement officials or military superiors. As with the laboratory report, the prosecutor should have foreseen the likely relevance of this evidence for one purpose or another at trial. "[I]f there is a reasonable prospect that the statement might be offered in evidence during the trial, then disclosure is required." *Id.* at 263. Significantly, trial counsel himself did not dispute that he was obligated to notify appellant of the statement; instead, he simply claimed to have "overlooked the urinalysis statement."

D

While we agree that the failure to disclose this evidence constituted error, we do not agree with appellant

that exclusion of the evidence was necessary to remedy the situation. RCM 701(g)(3) permits the military judge to redress a failure to disclose evidence—such as the laboratory report here—in a variety of ways, including ordering discovery, granting a continuance, excluding the evidence, and "enter[ing] such other order as is just under the circumstances." Mil. R. Evid. 304(d)(2)(B) is equally flexible as to evidence like appellant's statement to Mrs. Dale. In *United States v. Callara*, *supra* at 263, we pointed out that this provision "grants authority to the military judge to 'make such orders as are required in the interests of justice'—orders which may include but certainly are not limited to suppression of the pretrial statement as evidence."

Appellant has pleaded with this Court to recognize that a continuance in these circumstances was not "just under the circumstances" and not adequate "in the interests of justice." He argues that a continuance would only have permitted the damaging evidence to lie and fester in the minds of the court members in the interim, growing to an importance even greater than it had initially. While generally we have some sympathy for this position, the same could be said to a greater or lesser degree in any case of erroneous nondisclosure, where a continuance was used as the remedy.

We realize that Trimper would probably have testified in a more restrained manner if he had been aware that the Government had evidence of the positive urinalysis on September 4. Thus, if the military judge had accepted the defense contention that the non-disclosure was part of a cunning prosecutor's scheme to "ambush" appellant when he testified, the grounds for excluding the evidence would be stronger.

However, even intentional nondisclosure of discoverable evidence does not inevitably require as a sanction that the evidence be excluded. Indeed, in *Callara*, we expressly concluded that,

> even if the evidence had shown that trial counsel willfully violated Mil. R. Evid. 304(d)(1) in not disclosing the statement prior to appellant's arraignment, . . . the judge was still free to determine that it would be "in the interests of justice" to admit the statement when the statement demonstrated that appellant had lied as a witness.

*Id.* at 263. Our statement there prophesied the facts of this case and, as well, fully disposes of appellant's hollow pleas for justice.

III

The decision of the United States Air Force Court of Military Review is affirmed.

Judges COX and SULLIVAN concur.

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